

No. _____

**In The
Supreme Court of the United States**

PERCY TAYLOR,

Applicant,

v.

JAMES LEBLANC,

Respondent.

**On Application for an Extension of Time to File Petition for a Writ of
Certiorari to the United States Court of Appeals for the Fifth Circuit**

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To the Honorable Samuel Alito, as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

In accordance with this Court’s Rules 13.5, 22, 30.2, and 30.3, applicant Percy Taylor respectfully requests that the time to file his petition for a writ of certiorari be extended by thirty (30) days, up to and including Wednesday, September 13, 2023. The Court of Appeals issued its original opinion on February 14, 2023 (Appendix B). The Court of Appeals withdrew its original opinion and replaced it with a new one on May 15, 2023 (Appendix A). Absent an extension of time, the petition would be due on Monday, August 14, 2023. This application is being filed more than 10 days before the petition is due. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

Background

This case presents an important question regarding qualified immunity: whether, after deciding that (1) there was a violation of a constitutional right and that (2) the state of the law at the time of the violation clearly established the existence of that right, courts can still grant qualified immunity because (3) the defendant’s conduct was objectively reasonable in light of the clearly established law.

Although this Court has made clear that the qualified immunity test asks just two questions—(1) whether there was a constitutional violation and (2) whether the law was clearly established at the time of the violation, see *Tolan v. Cotton*, 572 U.S. 650, 655-656 (2014)—the circuits are divided over the inclusion or operation of a third “objective reasonableness” inquiry. According to the Seventh Circuit, “the reasonableness of an official’s actions [is not] an independent factor in determining whether

a right is clearly established.” *Jones v. Wilhelm*, 425 F.3d 455, 461 (7th Cir. 2005). The Tenth Circuit, on the other hand, can grant qualified immunity even if plaintiff showed a violation of a clearly established right, so long as defendant proves that “her conduct was nonetheless objectively reasonable.” *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003). The First Circuit, in a new twist, “abandon[ed]” its “three-step analysis,” replacing it with a “two-part test.” *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009). This change was form over substance, however, as the second prong looks not only to “the clarity of the law at the time of the alleged civil rights violation” but also to “whether a reasonable defendant would have understood that his conduct violated the plaintiffs’ constitutional rights.” *Ibid.*

In the case below, where a prisoner was detained more than two years beyond the expiration of his sentence, App. B at 4, the Fifth Circuit originally followed the Tenth Circuit’s approach, only instead of shifting the burden to defendant to show that he acted reasonably in light of the law that clearly established the unconstitutionality of overdetention, it was plaintiff who had to prove that defendant acted objectively unreasonably. *Id.* at 6-7. The Fifth Circuit concluded that plaintiff had not satisfied his burden in proving the third step of qualified immunity because he had inadequately briefed, and therefore forfeited, it. *Id.* at 7.

When the court substituted the original opinion with a new one,¹ however, it sided with the First Circuit: the prisoner had to still show that defendant acted

¹ The Fifth Circuit issued the new opinion on May 15, 2023, ninety days after the original opinion was filed. Prior to that, on April 29, 2023, applicant filed a pro se motion asking Justice Alito to extend the deadline for filing a petition for certiorari—which was due on May 15, 2023—to July 14,

objectively unreasonably, but under the auspices of an expanded second prong, not as a stand-alone inquiry. App. A at 3. Fundamentally, however, the analysis was the same: instead of looking to *the state of the law* at the time of the conduct and in light of the specific facts of the case, as the Seventh Circuit would, the Fifth Circuit below also looked to defendant’s *state of mind*, as the First Circuit and Tenth Circuit would.

This division between the circuits is not a mere formality. As the First Circuit itself explained, the objective reasonableness inquiry is “often the most difficult one for the plaintiff to prevail upon” and “Section 1983 actions frequently turn on the third prong . . . which channels the analysis from abstract principles to the specific facts of a given case.” *Wilson v. City of Boston*, 421 F.3d 45, 57-58 (1st Cir. 2005) (internal quotation marks omitted). Similarly, then-Judge Sonia Sotomayor criticized the Second Circuit’s “*ad hoc* inquiry into the reasonableness of the officer’s conduct.” *Walczyk v. Rio*, 496 F.3d 139, 166-167 (2d Cir. 2007) (Sotomayor, J., concurring). “By introducing reasonableness as a separate step, we give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck ‘between the interests in vindication of citizens’ constitutional rights and in public officials’ effective performance of their duties.’” *Id.* at 169 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). Although the Second Circuit has never explicitly disavowed the third step, it criticized it as being controversial, *Ricciuti v. Gyzenis*, 834 F.3d 162, 170 (2d Cir. 2016), and has not invoked it since.

2023. Justice Alito granted the motion on May 3, 2023, see Docket No. 22A956, but the extension has been overwritten by the Fifth Circuit’s replacement of its opinion.

Given the disagreements between—and within²—the circuits on the basic mechanics of the qualified immunity test, this case is a serious candidate for review.

Reasons Why an Extension of Time Is Warranted

Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel at the Institute for Justice—recently retained by applicant for the purposes of filing the petition—need additional time to fully familiarize themselves with the record, the decisions below, and the relevant case law, while still pursuing other litigation in trial and appellate courts. In addition to this case, counsel’s obligations include:

- Ongoing work related to a petition for certiorari in the United States Supreme Court in *Gonzalez v. Trevino*, Fifth Circuit Case No. 21-50276;
- Ongoing work related to a petition for certiorari in the United States Supreme Court in *King v. United States*, Sixth Circuit Case No. 17-2101;
- Ongoing work related to litigation in the Eighth Circuit Court of Appeals in *Pollreis v. Marzolf*, No. 21-3267;
- Ongoing work related to litigation in the Fourth Circuit Court of Appeals in *Gibson v. Goldston*, No. 22-1757;
- Ongoing work related to litigation in the Tenth Circuit Court of Appeals in *Rosales v. Bradshaw*, No. 22-2027;
- Ongoing work related to litigation in the Northern District of California in *Quiñonez v. Does 1 through 5*, No. 3:22-cv-03195;
- Ongoing work related to litigation in the Western District of Louisiana in *Rosales v. Lewis*, No. 1:22-cv-5838;

² See, e.g., *Dunigan v. Noble*, 390 F.3d 486, 491 n.6 (6th Cir. 2004) (discussing how “some panels of this Court have continued to rely on a three step analysis of qualified immunity claims,” while other panels have not).

- Ongoing work related to litigation in the District of Minnesota in *Mohamud v. Weyker*, No. 17-cv-2069.

For these reasons, applicant requests that the due date for the petition for a writ of certiorari be extended to September 13, 2023.

Conclusion

Applicant requests that the time to file a writ of certiorari in the above-captioned case be extended 30 days to and including Wednesday, September 13, 2023.

June 2, 2023

Respectfully submitted,



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